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No. 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

VERMILYA-BROWN COMPANY, INC., NECARO COMPANY, INC., AND THE ARTHUR A. JOHNSON CORP., doing business as BERMUDA BASE CONTRACTORS, *Petitioners,*

v.

JOHN JOSEPH CONNELL, EUGENE T. FITZPATRICK, WILLIAM L. FLANAGAN, JOSEPH JOHN GILROY, JOHN JOSEPH MORTIMER, JAMES F. McDONALD, PAUL F. NEITER, WILLIAM H. PARKER, JR., LOUIS AUGUST REHBERG, HOWARD L. SHOCK, JR., and DAVID JOSEPH TOWNSEND.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR REHEARING.

A rehearing herein is respectfully requested for the following reasons:

1. The Fair Labor Standards Act of 1938 may not properly be applied to the Leased Areas here involved unless and until Congress exercises its discretionary function to legislate respecting those Areas under authority subsequently granted by the Agreement and Lease of 1941.

2. The Court's conclusion rests upon a rule of statutory construction novel to the history of this Court, and contrary to the intent of the Fair Labor Standards Act of 1938 and of the international arrangements for the Leased Areas in 1941.

3. Every element of fact bearing on the intent of the lawmakers confirms that the Act is inapplicable to the Leased Areas.

4. There is no basis for attributing to Congress the intent to give the term "possession" a non-political meaning solely because the Leased Areas are now held not to be "possessions" in a political sense.

5. The Court's conclusion and judgment are based on an erroneous construction of the international arrangements as granting the United States "sole power" in the Leased Areas on a par with all the powers of sovereignty exercised in the Panama Canal Zone under the Isthmian Treaty.

6. The probable extension of many other statutes of the United States to the Leased Areas by judicial construction, without Congressional sanction or the consent of the Governments concerned, will result in confusion as to applicable law in the Leased Areas, other military bases, trust territories and occupied areas, will embarrass native economies, and will impede future negotiations for other leased military bases.

I

Application of the Fair Labor Standards Act of 1938 to the Leased Areas is rested by the Court, not upon sovereignty of the United States over the Leased Areas, but upon the "voluntary grant of the authority by the sovereign lessor to legislate upon maximum hours and

minimum wages" (Opinion, p. 12). The Court states that "the leased area is under the sovereignty of Great Britain and . . . is not territory of the United States in a political sense, that is, a part of its national domain". *Id.*, p. 3. It would seem to be the view of the Court that the Area is not a "possession" in the sense of being a part of the domain of the United States; but that since the grant by Great Britain was broad enough to include the power to legislate upon maximum hours and minimum wages Congress, for reasons stated in the Opinion, is held by its use of the word "possessions" to have intended "to have the Act apply to employer-employee relationship on foreign territory under lease for bases". *Id.*, p. 12.

In so holding it is submitted that the Court overlooked what should have constituted a barrier to the conclusion reached. The grant to the United States by the sovereign lessor, the United Kingdom, was in 1941. This grant, that is, the Agreement and Lease, is the sole basis of Congressional authority in the leased Areas. The grantee, the United States, must therefore act under and pursuant to the grant. Where legislation is concerned it must act through Congress. The legislative authority found by the Court to be contained in the grant must be exercised in order to apply legislation which rests upon the power granted. The nature of the grant for military purposes emphasizes this; but it would be true even if the grant were more general. A judgment is required to be exercised by Congress on the basis of its power under the grant and on the basis of its policy to exercise such power or not to do so.

Since the power of Congress comes from the grant, as the Court states, then Congress must act under that grant before it may be invoked by the Court as the basis of legislative authority. And this of course Congress

has not done. The Fair Labor Standards Act of 1938 was not enacted by Congress in the exercise of a power granted by Great Britain in 1941. The Act stems from the power possessed by Congress as legislative authority over certain aspects of interstate and foreign commerce from the States, territories and possessions. No decision was made by Congress in 1938 under the instruments of the grant here involved, so far as wages and hours were concerned, as was done in 1941 when the Longshoremen's and Harbor Workers' Act was applied to the Leased Areas in the exercise of the powers granted under the Agreement and Lease.

The situation was quite different in *Puerto Rico* v. *Shell Oil Co.*, 302 U. S. 253. This difference has been overlooked. There Congress had legislated to the full extent of its authority over the subject matter, utilizing its plenary power over territories of the United States, i.e., under American sovereignty, as well as its power over interstate and foreign commerce. It made no difference therefore that Puerto Rico was not under United States sovereignty at the time the Act became law; that territory subsequently came within the sovereignty of the United States and thereby came within the scope of areas to which the legislation extended. Puerto Rico did not come within the legislative power of the United States pursuant to a grant of limited character to enact legislation within the limitations of the grant with sovereignty elsewhere retained. The sovereign power exercised by Congress covered sovereign territory; the time territory took that character was not material. There was thus no difference in the sovereign power exercised and the sovereign character of the authority of the United States over the area to which the legislation was thereafter held applicable.

Here there is a critical difference. The power exercised by Congress in 1938 was solely that over interstate and foreign commerce; it was not the power subsequently granted to Congress in 1941 to legislate for the Leased Areas within the terms of the Agreement. This granted power has never been considered and exercised to regulate wages and hours of work. In reaching its conclusion that Congress in 1938 by the use of the word "possessions" intended to apply the Fair Labor Standards Act to "foreign territory under lease for bases", the Court overlooks the nature of the legislative act of 1938 in comparison with the nature of the legislative consideration and action required to exercise the power granted in 1941. Emphasis though not substance is added when it is remembered that notwithstanding the remedial purpose of the Fair Labor Standards Act, it did not even exhaust the full commerce power possessed by Congress, *McLeod* v. *Threlkeld*, 319 U. S. 491, 493, much less invoke the plenary power over territories and possessions (U. S. Const. Art. IV § 3 cl. 2), or the subsequently obtained power over the Leased Areas stemming from the implied authority of the Executive to negotiate international agreements. *Curtiss-Wright Corp.* v. *United States*, 299 U. S. 304, 318.

The result is the same if it be argued that the power granted was exercised in advance of the grant of power. For there still remains the barrier to this result that the powers granted could not thus be exercised without a Congressional decision based upon them with knowledge of them. The Court it is submitted may not properly exercise this legislative function, and thereby extend to the Leased Areas and other bases all existing Federal legislation which could be applied by Congress should it choose to do so. The choice to make the appli-

cation, we submit, is for Congress, on consideration of the terms of the Agreement and the policy issues involved, including prevailing wage rates, standard and cost of living in the various localities, the effect on the economy of each British colony as a whole, and perhaps other questions of international relations or national defense.

II

Aside from the foregoing, the opinion reaches its conclusion upon the premise of a rule of statutory construction novel to the history of the Court, and which we pray should be reconsidered. It is established that if the words of a statute are ample to cover a situation which was not in the contemplation of the legislature when the words were used, nevertheless the situation is deemed to be covered unless it can be said that it would have been excluded had it been considered by the legislature. *United States* v. *Southeastern Underwriters' Association*, 322 U. S. 533, 539, 553, 560; *Puerto Rico* v. *Shell Oil Co., supra; Ozawa* v. *United States*, 260 U. S. 178, 195-196; *United States* v. *Bhagat Singh Thind*, 261 U. S. 204, 207-208. Congress need not be shown to have contemplated all applications of the language it uses. It is ordinarily enough that the language applies. In deference to the legislature the courts thus permit the intent of the legislature to coincide with the breadth of the language used. Under this rule if the Leased Areas were possessions of the United States the Act would apply though they were not within the consciousness of Congress when the Act became law. This was the situation in *Puerto Rico* v. *Shell, supra*. Subsequent to the legislation there involved, Puerto Rico came within the sovereign domain of the United States to which the language of the statute applied.

In the pending case the language is not enough of itself to cover the Leased Areas. This the Court seems to concede: "We predicate our views on the issue presented upon the postulate that the leased area is under the sovereignty of Great Britain and that it is not territory of the United States in a political sense, that is, a part of its national domain" (Opinion, p. 3). Of course if it is not territory of the United States in a political sense it is not a possession of the United States in a political sense; that is, it is not a part of its national domain. The meaning of the term "possession" therefore is construed by the Court in bringing the statute to the Leased Areas. The rule of construction above referred to accordingly has no application.

The meaning of "possession" is then divided by the Court into at least two parts. Its meaning in a political sense is laid to one side; it is then assumed that Congress did not use the term in a political sense. What is left of the term is then subjected in the context of the statute to a geographical meaning in the light of the novel rule of statutory construction which ignores all political considerations, that "our duty as a Court is to construe the word possession as our judgment instructs us the lawmakers, within constitutional limits, would have done had they acted at the time of the legislation with the present situation in mind". *Id.*, p. 10. It is respectfully submitted that this is not construing the language used by Congress, or searching for the purpose of that language, considered alone or in the full context of its use. It is, on the contrary, a determination by the Court that Congress decided to cover the Bases, in circumstances which did not exist at the time of the legislation, and also ascribes to the language used the scope the Court believes Congress would have given to the legislation itself, had the Leased Areas then been

granted. This, it is submitted, is judicial legislation; and is opposed by all that this Court has said upon the subject of separation of judicial and legislative powers.

It is one thing to say that an unforeseen situation is covered by language which is ample to embrace it when the purpose of the legislation is consistent with application of such language to those unforeseen circumstances. It is a very different thing to construe the meaning of Congress or the language itself so as to make the words serve a purpose the Court believes Congress would have desired if it had known about it, but to which Congress did not address itself. This substitutes the will of the Court for the absence of legislative consideration and enactment. This is particularly so where as here the grant of power to Congress to legislate on the subject arose subsequent to the action under consideration and when that action was not taken under the grant itself. Congress did not legislate on the basis of the scope even of its existing power to do so, much less on the basis of power alone. To include in the Act all areas where power then or thereafter might exist would re-write the statute, and would assume in advance an exercise of legislative judgment without the actual exercise of such judgment by the only branch of the government constitutionally vested with authority in that regard.

If Congress had desired that the Act of 1938 should apply to all areas over which the United States might in the future acquire by grant the implied power to regulate wages and hours anywhere in the world, it did not say so. Indeed Congress made a "deliberate and purposeful" choice not to extend the Act "to the furthest reaches of Federal authority". *McLeod* v. *Threlkeld*, 319 U. S. 491, 493, and cases there cited. The Act as written did not even utilize the Federal power over

the District of Columbia, let alone that over Leased Areas located throughout the world not under the sovereignty of the United States, and obtained by international agreements with limited scope and for limited purposes—in this instance, national defense—a situation utterly unforeseeable in 1938.

III

Assuming the correctness of the rule of construction applied by the Court, it is necessary to examine all the surrounding circumstances to apply that test—namely, what the lawmakers "would have done had they acted at the time of the legislation with the present situation in mind". We submit that every element of fact bearing on the issue opposes the inference drawn by the Court.

(i) Granted that Congress did not specifically refer to coverage of the Guantanamo Naval Station, leased in 1903, the lease by Cuba forbade any private production or commercial activity therein, within the general design of the Act of 1938; the Attorney General had previously held that the Guantanamo Station was not a "possession" of the United States, as that term had always been understood in our jurisprudence; and there was nothing to the contrary in 1938 in the practices or decisions of any branch of our Government. There was likewise no reference in the legislative history to the Canal Zone, but this Court had previously concluded that the area "belonged to" the United States, *Wilson* v. *Shaw*, 204 U. S. 24, 33, and the Department of State had previously insisted that under the Isthmian Treaty, the United States exercised in perpetuity therein all the powers of sovereignty, to the complete exclusion of any exercise of sovereign rights, power or authority by the Republic of Panama. 2 *Hackworth, Digest of In-*

ternational Law, pp. 172, 801-805. Well-established canons of construction vouchsafed that the word "possession" would be given its usual meaning, that is, as including such areas as Puerto Rico and the Canal Zone and excluding the leased area at Guantanamo Bay.[1] The Wage-Hour Administrator promptly confirmed this in regulations based on such usual meaning, and such regulations have remained to this day unchanged by the Administrator or by Congress.

(ii) On June 26, 1940, just prior to the negotiations for the Leased Areas here involved, Congress amended the Act at the request of the Wage-Hour Administrator, by modifying the homework and minimum wage provisions to meet the special economic conditions regarding production for commerce from the Virgin Islands and Puerto Rico. 54 Stat. 615, 29 U. S. C. §205e, 206(5). The gross disparities between the economies of those areas and the continental United States led Congress to withdraw the full application of the Act respecting those areas. *Hearings on H. J. Res. 544*,

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[1] As for the other leased bases cited in the Court's opinion (p. 7), we are advised that the United States has never implemented in any way the 99-year leases granted by Nicaragua under the Bryan-Chamorro Convention of 1914. 39 Stat. 1661. The military bases contemplated in the Philippine Islands under the Independence Act of 1934, also cited in the Opinion, likewise were not in being when the Fair Labor Standards Act was passed, and the latter Act in no case applied to the Philippines since the Islands were not specifically mentioned as required by general statute. 39 Stat. 547, 48 U. S. C. § 1003. Moreover, under the Independence Act of 1934 and the Proclamation of Philippine independence in 1946, the United States *excepted* military bases from the general transfer of property and sovereignty to the Philippine Commonwealth. 48 Stat. 456, 459, 463, 48 U. S. C. §§ 1235, 1240(b); 58 Stat. 626, 48 U. S. C. § 1235a; 60 Stat. 1352. See Exchange of Notes annexed to *Treaties and Other International Acts Series 1775*, March 14, 1947.

Committee on Appropriations, U. S. Senate, 76th Cong. 3d Sess., pp. 1-4; S. Rep. 904, Committee on Education and Labor, U. S. Senate, 76th Cong. 1st Sess., pp. 1-4. The object of the measure, as explained by the Wage-Hour Administrator, was "to fix wage rates for these islands which are high enough to discourage migration of business from the United States, but which are low enough to encourage industrial development and to provide employment opportunities in the islands". *Id.*, p. 4. The Administrator has subsequently opposed and Congress has rejected legislation to disregard such considerations and eliminate the modifications applicable to production for commerce from these Atlantic possessions. E.g., S. 1349, 79th Cong. 1st Sess. *Hearings on S. 1349*, Committee on Education and Labor, U. S. Senate, 79th Cong. 1st Sess., p. 260.

Congress thus plainly indicated, before and since the Leased Areas were negotiated, that special economic considerations required special statutory treatment even regarding those Atlantic outposts within the sovereign domain of the United States and indisputably covered by the statute. It cannot be inferred that Congress was less sensitive to comparable economic considerations affecting the full application of the Act in British-owned Atlantic outposts where we were mere lessors for a term, with only the right to fortify and defend, and with no right whatever to produce goods for commerce or otherwise to carry on private commercial enterprise.

Of course the Act continues to be technically applicable in certain sparsely populated Pacific Islands (Guam, American Samoa), but that results from the fact that they are ceded territory under our sovereignty, and consequently "possessions of the United States".

(iii) After the Leased Areas were negotiated in 1940-41 the Administrator did not amend his regulations to embrace them, and he specifically ruled they were not included in the term "possession". In this connection it was apparent that in the Leased Areas, as in Guantanamo Bay, no private commercial or production activity could be carried on, of the type within the purview of the Act; and that the primary private employment involved would be on military construction work likewise beyond the scope of the Act. *Cf. Murphey* v. *Reed*, No. 206, October Term 1948.

(iv) Congress promptly confirmed the Administrator's interpretation when it enacted in 1941 and 1942 the War Damage and Defense Base Acts, which specifically referred to the Leased Areas as separate from and in addition to the "possessions" of the United States. Granted that the problems there involved were "not specifically considered" in 1938, as the Court's opinion declares (p. 10, note 12), this period was the earliest Congress could have considered the Leased Areas, except as the earlier general factors already cited indicated an intent to exclude any area merely leased for a term for military purposes.

We respectfully submit that if judgment is to be instructed by the intent of the lawmakers, the foregoing can lead to but one conclusion, that the Leased Areas are not "possessions" of the United States as that term is used in the Fair Labor Standards Act of 1938 and other statutes.

IV

The Opinion (pp. 9-10) states that Congressional intent as to inclusion of the Leased Areas is not definitely indicated by use of the term "possession". Authority to apply wage and hour legislation is derived, at

best, only by implication from a general grant of control for military purposes, in a non-commercial area, stemming from the subsequent international agreement which makes the grant. It would seem clear that the Court owes to Congress the right to make the decision under the power thus granted to Congress. This is emphasized by the fact that Congress had already in 1940 excluded full application of the Act even to Caribbean islands under United States sovereignty, i.e., Puerto Rico and the Virgin Islands, both plainly within the coverage of the Act. Especially where the authority of the Congress is subsequently acquired by international agreement which is silent on the precise matter, even if broad enough in terms to include authority over wages and hours, we submit that the conceded failure of existing legislation definitely to include the bases creates the very situation where responsibility must be exercised by Congress under the powers granted it by the Agreement. Otherwise the uncertainty found by the Court is resolved by a wholly unnecessary surmise as to what Congress would have done under circumstances non-existent when it acted; and the surmise takes a form contrary to the known action of Congress in each instance in which it has legislated with respect to the Leased Areas, namely, its treatment of them as not being "possessions". The legislative pattern is clear. Congress would have used appropriate words to convey its meaning, as it has consistently done in legislating for these Leased Areas when it has intended to cover them, or it may have decided not to cover those Areas.

To reach its conclusion the Court goes further than deciding now what it surmises Congress would have done. It decides also that Congress did not in fact use the term "possessions" in a political sense, and it does

this simply because long afterwards the Court itself cannot say that the Leased Areas are possessions in a political sense. No basis is stated for attributing a non-political meaning to Congress. The full context itself is to the contrary:

"any State of the United States or the District of Columbia or any Territory or possession of the United States". The Fair Labor Standards Act was framed with regard to the political power of Congress over the domain of the United States within the reach of the commerce clause. In fact it did not exercise its power co-extensive with that domain as it existed in 1938. *Supra*, p. 5. *A fortiori*, it did not exercise its power more extensively.

We submit there is no basis for attributing to Congress a non-political meaning because of the subsequent conclusion of the Court that the bases are not possessions in a political sense.

V

Granting that sovereignty over the Leased Areas is retained by the British Crown, such sovereignty is a mere abstraction except as it embodies "supreme powers of legislation and government". *Cf. Posados v. National City Bank*, 296 U. S. 497, 502. By its unanticipated interpretation that the term "possession" is not a word of art, the Court holds open the strong probability that many other statutes covering "possessions" of the United States will be held applicable to the Leased Areas here involved, to other bases leased for shorter periods, as well as to the Trust Territory of the Pacific held under the United Nations.

This conclusion, and the resulting judgment for the respondents, it is submitted are based on an erroneous

construction of the international arrangements as granting the United States "sole power" in the Leased Areas on a par with that in the Panama Canal Zone. The authority of the United States in the latter explicitly embraces all the powers of sovereignty, whereas in the Leased Areas it is carefully restricted to the military needs and character of the bases. Pet. Br. pp. 19-38. The Leased Areas are not part of American sovereign domain, such as Territories or possessions. They represent rights to be exercised at our discretion and within prescribed limits, to occupy and fortify designated areas in *British* possessions; and if this includes the power to legislate regarding wages and hours that power arises from the terms of Article I of the Agreement, not from a grant of sovereign power as in the case of the Canal Zone.

To the extent that statutes of the United States applicable generally to United States "possessions" are extended to the Leased Areas by judicial construction, without Congressional sanction and determination of military necessity or need incidental thereto, far-reaching and unanticipated provisions will have been added to the carefully drafted terms in international agreements governing the limited use and occupation of such military base areas—and this without the consent of the foreign governments directly concerned or Act of Congress under the agreements. The subject matter of such statutes may range from nationality to postage, labor disputes to taxation.

VI

The inevitable consequence of the foregoing will be confusion as to applicable law in existing leased bases, embarrassment to native economies, conflict with local

wage standards for native labor, and impediment to the negotiation of other bases by the Executive as required by the international situation from time to time. American contractors and Government agencies will be unable to make practicable arrangements for work in leased areas or trust territory, in the present circumstances of uncertainty as to the applicable law. Moreover, the breadth of the decision will undoubtedly give rise to vexing litigation as to the applicability of many statutes of the United States in former enemy territory occupied by our armed forces. *Cf. Republic Aviation Co.* v. *Lowe,* 164 F. 2d 18 (C. C. A. 2d), *cert. den.* 333 U. S. 845; *Brewer* v. *United States,* 79 F. Supp. 405 (N. D. Cal.); *Brunell* v. *United States,* 77 F. Supp. 68 (S. D. N. Y.).

None of these consequences, already felt or reasonably to be anticipated, need occur in order to accomplish the Congressional purpose in the Fair Labor Standards Act. That Act simply did not cover the Leased Areas and was not enacted pursuant to the authority contained in the grant of them. Congress is free to decide, and to Congress should be left the decision, whether to include the Leased Areas in the coverage of the Act, dependent on whether it deems it advisable so to do and within the authority granted under the Agreement.

CONCLUSION.

For the foregoing reasons and because of the public interest in the question and the serious consequences of the opinion and judgment rendered, it is respectfully requested that this application for rehearing be granted, and the cause reargued before the full bench if practicable.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

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